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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941

Nos. 1104-1105

WILLIAM MILBURN,

Petitioner,

vs.

MARTHA HEALD and ORLAND HEALD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRITS OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF

BARNABAS F. SEARS,
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PETITION FOR WRITS OF CERTIORARI

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William Milburn, respectfully represents to this court as follows:

This action was brought by respondents, Martha Heald and Orland Heald to recover damages for personal injuries occasioned by the alleged negligence and wilful and wanton misconduct of petitioner, William Milburn. The action was brought in the District Court of the United States for the Northern District of Illinois, the jurisdiction of which court was based upon diversity of citizenship.

The trial resulted in two separate verdicts in favor of the plaintiffs below, Martha Heald and Orland Heald, for the sums of Nine Thousand ($9,000.00) Dollars and One Thousand ($1,000.00) Dollars respectively (Tr. 361-362). Judgments were entered upon such verdicts on the 7th day of January, 1941 (Tr. 368).

On appeal to the United States Circuit Court of Appeals for the Seventh Circuit that court affirmed the judgments of the trial court, the opinion being filed (Tr. 392, 399) and the judgment of affirmants (Tr. 400) being entered on the 13th day of January, 1942.

The complaint consists of two counts. The first count (Tr. 2), omitting formal parts, charged that the defendant:

(1) Carelessly and negligently drove and operated his said automobile.

(2) Carelessly and negligently drove his said automobile at a speed greater than was reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of persons on said public highway, at the place aforesaid, contrary to and in violation of Paragraph (a), Section 49, of Article VI, of the Uniform Act Regulating Traffic on Highways, of the State of Illinois.

(3) Carelessly and negligently failed to keep a reasonably careful lookout for traffic approaching from the opposite direction, and to determine the position of his automobile on the roadway.

(4) Carelessly and negligently failed to drive his automobile on the right half of the roadway, although the roadway was of sufficient width and open to traffic proceeding in both directions; but, on the contrary, drove his automobile on the left half thereof, into the path of the automobile of the plaintiffs; contrary to the provisions of Section 54 of Article VII of the Uni-

form Act Regulating Traffic on Highways, of the State of Illinois.

(5) Carelessly and negligently drove his automobile to the left of the center of the said highway, into that part of the roadway thereof reserved for traffic moving in the opposite direction.

(6) Upon meeting the automobile of the plaintiffs, carelessly and negligently failed to pass to the right thereof, and carelessly and negligently failed to give the driver of the plaintiffs' automobile at least one-half of the main traveled portion of the roadway as nearly as possible; contrary to the provisions of Section 55, of Article VII of the Uniform Act Regulating Traffic on Highways, of the State of Illinois.

(7) Carelessly and negligently drove his automobile on said highway at a time when said vehicle, by reason of the fact that one of the wheels thereof was insecurely attached thereto, was in such unsafe condition as to endanger persons and property, contrary to the provisions of Section 102 of Article XV of the Uniform Act Regulating Traffic on Highways, of the State of Illinois, as a direct and proximate result of which the aforesaid wheel became detached from the automobile and caused said vehicle to run onto the left half of the highway and come into violent collision with the automobile of the plaintiffs.

The second count (Tr. 5) is a wilful and wanton count and charges that the same acts of negligence above set forth were done wilfully and wantonly and with a conscious indifference to surrounding circumstances and conditions.

Defendants' answer to both counts (Tr. 8, 10) denied all of these allegations of negligence and wilful and wanton misconduct.

With respect to the alleged negligence or wilful and wanton misconduct of the defendant claimed to be the proximate cause of the injuries in question the essential facts are as follows:

The collision in question occurred upon U. S. Route 330, an ordinary two-lane concrete pavement eighteen feet in width, divided by a center line, between the cities of Elburn and Geneva, in Kane County, Illinois. At the time of the collision the respondents, Martha and Orland Heald, were traveling in an easterly direction and the petitioner, William Milburn, was traveling in a westerly direction upon said highway, approaching each other. The highway was straight (Tr. 120) flanked by ordinary grass shoulders (Tr. 66) and the day July 1, 1940 was a clear, warm, dry day (Tr. 66, 121). The collision occurred about 2:15 to 2:30 in the afternoon (Tr. 62, 121, 197).

Prior to the collision William Milburn, the petitioner, had left his home in DeKalb, Illinois (Tr. 179, 181) driving a 1934 Chevrolet two-door sedan. A week or ten days earlier this car had been taken in trade by a firm in which Milburn was one of the partners (Tr. 180, 243). At that time a firm mechanic had submitted the car to a routine inspection, including tests of the brakes, nuts, lights, horn, windshield wiper and a three or four mile road test (Tr. 243). Milburn drove to Geneva, had breakfast (Tr. 181) and then drove to Downers Grove where he stopped to shop for used cars (Tr. 181). He went from Downers Grove to Hinsdale and between 10:30 and 11:00 o'clock in the morning stopped at a tavern on the way for ten or fifteen minutes and had two drinks of whiskey (Tr. 182, 196, 197). In Hinsdale he looked at used cars and then drove to LaGrange, Illinois, where he looked at used cars (Tr. 182-183).

Between 11:30 and 12 o'clock he drove to the Oldsmobile Garage in LaGrange where he asked a mechanic to investigate a creaking noise in the rear end of his car (Tr. 153, 155, 158, 183). He had demonstrated this noise to the mechanic by driving the car backward and forward across the yard (Tr. 153, 183). The mechanic located the noise in the left rear wheel, removed the hub cap and tightened the nuts on that wheel (Tr. 153, 155, 158, 183), all of which were loose about one turn of the wrench. The mechanic, by having Milburn drive backward and forward four or five times, showed that the noise was eliminated and he told Milburn that the car was O. K. (Tr. 154, 159, 194). Milburn did not detect a loose wheel at any time thereafter (Tr. 195).

Leaving this garage about noon, Milburn drove east to Harlem Avenue in the City of Chicago where he had lunch (Tr. 184). He then looked at used cars in the yard of the National Garage nearby (Tr. 184). Thereafter he drove to Snow Brothers Ford Garage in Oak Park, Illinois where he looked at used cars (Tr. 185). On his return journey he drove on Route 64 to St. Charles, Illinois and then turned south to U. S. Route 330 (Tr. 185) and was on the westward journey on U. S. Route 330 at the time the collision occurred. In the interim Milburn had traveled between sixty and one hundred miles (Tr. 197-198).

As the motor vehicles approached each other, Heald, driving plaintiffs' car, was going about forty miles per hour (Tr. 120) and Milburn between thirty-five and forty-five miles per hour (Tr. 186, 199). There were no other cars in sight (Tr. 121, 199). Heald saw the defendant's car when it was between fourteen hundred and fifteen hundred feet—more than a quarter of a mile—away (Tr. 121, 147). There was nothing out of the ordinary about Milburn's car that attracted his

attention when he first saw it at a distance coming toward him (Tr. 127, 147). He saw it from then until the time of the collision (Tr. 121) and testified that the defendant was doing a pretty good job of driving it (Tr. 147). The plaintiff, Martha Heald, testified that she saw defendant's car before the collision and noticed it only as she would notice any car approaching (Tr. 113). The defendant was traveling within his own proper traffic lane (Tr. 187, 198).

When the two cars were about seventy-five to eighty feet apart (Tr. 121, 200) the rear end of the Milburn car suddenly dropped (Tr. 186, 199) and in the same instant the car veered south of the center line toward the Heald car (Tr. 113, 121). The left sides of the two cars came together.

After the collision the left rear wheel of the defendant, Milburn's, car was missing (Tr. 18, 72, 90). The wheel was in a field on the north side of the road (Tr. 68, 72, 83-84). No damage was done to the fence nor did it bear any tire marks. The wheel itself bore no marks of damage nor did the tire, which was inflated (Tr. 73, 91, 164-165).

The wheels on the defendant, Milburn's, car were perforated by six holes arranged in a circle around the center of the wheel. From each axle drum on the car six bolts extended, arranged in a corresponding circle around the center of the axle drum. The wheel was locked to the drum by the bolts and nuts (Tr. 107). After the accident the nuts were still on the bolts on the left rear axle drum of the Milburn car (Tr. 106-107-108). Later it was shown that the holes on the left rear wheel were worn but undamaged (Tr. 108, 165) and that the nuts used to clamp this wheel to the axle drum could be passed through the holes (Tr. 108-109, 165).

There was considerable testimony with respect to the defendant, Milburn's, condition and behavior after the collision. There was evidence that Milburn was suffering from pain and shock but was not drunk. W. A. Keefer expressed the opinion that Milburn was not drunk but that he appeared to be dazed and in pain (Tr. 173, 175). C. A. Sorenson, a motorist who happened upon the scene, testified to the same effect (Tr. 163-164). The defendant, William Milburn, testified that he remembers nothing from the time the rear end of his car dropped just before the collision until he got into the Smith car after the collision and that he was not drunk when the collision occurred (Tr. 186, 188, 199, 203). Two witnesses who had seen Milburn earlier in the day testified that he was not drunk at the time they saw him.

On the other hand, there was testimony that after the accident Milburn was drunk, that he admitted he was drunk, that he refused to tell his name and talked incoherently and that he smelled of liquor.

Testimony was also admitted, over the objection of defendant, that James Smith, a constable who arrived on the scene, arrested Milburn and took him to the county jail at Geneva (Tr. 20-21, 64, 67, 71, 173-174). The court also admitted, over objection, the details of the arrest and incarceration of Milburn and the action taken by the officials in connection with his prosecution and the subsequent discontinuance thereof.

It is the contention of your petitioner that the evidence of the arrest of the defendant after the accident, his incarceration in jail and all of the circumstances incident to his arrest and the proceedings in connection with his prosecution on the charge of driving while intoxicated, was inadmissible under the Illinois law. That the issue whether or not the defendant was under the

influence of intoxicating liquor at the time the collision occurred was one of the issues for the jury in this case to decide. That the evidence relative to the arrest, incarceration and prosecution improperly advised the jury of the action of law enforcement officials, precluding the possibility of an open mind on the question of intoxication. That since such evidence was inadmissible under the Illinois law its admission by the trial court and the decision of the Circuit Court of Appeals holding it to be admissible is in conflict with the local applicable decisions and should be reversed.

It is also the contention of your petitioner that the respondents' closing argument to the jury which made a blanket charge of dishonesty, perjury and untruth against the entire defense and everyone connected with it was not only without foundation in the record but was, in language, so violent and vituperative as to be highly prejudicial to the defendant and to preclude the possibility of a fair trial; that the failure of the trial court to sustain objections thereto inadvertently lent the prestige of the trial court to the charge and the failure of the United States Circuit Court of Appeals to reverse the case on that ground was such a departure from the accepted and usual course of judicial procedure as to call for an exercise of the power of supervision of this court.

Only one cause was started in the District Court of the United States but that court entered separate judgments for different amounts in favor of the plaintiffs. Both of the judgments have been affirmed by the United States Circuit Court of Appeals for the Seventh Circuit, and that Court has stayed its mandate, pursuant to rule pending this application for writs of certiorari. Your petitioner presents herewith as a part of this petition and attached thereto a brief, showing more fully the issues involved.

WHEREFORE, your petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that this honorable court issue writs of certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this court a full and complete transcript of the record herein to the end that said judgments in favor of respondents Martha Heald and Orland Heald and against your petitioner may be reviewed and determined by this court as provided by law and that said judgments and each of them may be reversed and that your petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just and your petitioner will ever pray.

Respectfully submitted,

BARNABAS F. SEARS,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Statement.

A statement of the essential facts has been incorporated in the petition and will not be repeated here.

Grounds for Jurisdiction.

1. United States Circuit Court of Appeals for the Seventh Circuit has by its decision affirming the judgments in the case at bar so far sanctioned a departure by the lower court from the accepted and usual course of judicial procedure as to call for an exercise of this court of its power of supervision.

2. The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

Specification of Errors.

1. The closing argument of the plaintiffs to the jury constituted prejudicial error which precluded the possibility of a fair trial on the issues.

2. The admission by the trial court of the defendant's arrest, incarceration and prosecution following the accident in question constituted error of such a prejudicial nature as to preclude the possibility of a fair trial upon the issues.

ARGUMENT.

I.

The closing argument of the plaintiffs to the jury constituted prejudicial error which precluded the possibility of a fair trial on the issues.

The closing argument to the jury by plaintiffs' counsel, objected to by the defendant, was in part as follows (Tr. 294):

> "Mr. Ryan: * * * And then they come in with this dishonest, miserable, unfair, untrue defense—
>
> Mr. Sears: I object to the remarks, 'dishonest, miserable, unfair, and untrue defense.'
>
> Mr. Ryan: That is all it can be characterized.
>
> Mr. Sears: I object to that, your Honor.
>
> The Court: Wait a minute. He has a right to discuss the evidence to the jury and draw his conclusion, and they will pass on what it is.
>
> * * *
>
> Mr. Ryan: He hasn't fairly discussed the damages, and he hasn't told you why this lady should not receive substantially everything that was asked for in this case. I say this whole defense is untrue. I am not seeking sympathy. You use your good common sense and judgment, and analyze the evidence, treat this little lady from a sister state the way you would want to be treated if you were a party to this litigation, and the lawyers will have to be satisfied. This whole defense, I say, is a lie, and it makes one's blood boil to have to sit here and listen to it—
>
> Mr. Sears: I object to these inflammatory remarks in front of the jury.
>
> The Court: Proceed.
>
> Mr. Ryan: I say that a lie won't fit into anything but another lie, and that is why you can't get away with a lie. * * *"

The purpose of an argument to the jury is to lend assistance to a correct result. Yet, it can hardly admit of question, that the foregoing argument was calculated only to prejudice the jury against the defendant. It is a blanket indictment of all the witnesses for the defendant and a direct accusation that each and all of them committed perjury. To tell a jury that a defendant came in with a "dishonest, miserable, unfair, untrue defense" and that the entire defense is "a lie" and that "it makes one's blood boil to have to sit here and listen to it" and "that a lie won't fit into anything but another lie" is certainly not calculated to aid the jury in a consideration of the evidence. Particularly is this true when it comes in a closing argument to the jury with a defendant unable to answer it and utterly helpless to do anything about it but object and where in addition it receives at least a tacit consent of the court by the overruling of the objections.

Now, what was this "dishonest, miserable, unfair and untrue defense"? In this case there were ten witnesses who testified for the defendant, including the defendant himself. With respect to the question of liability four of them (Baker, Tr. 154; Kiefer, Tr. 174; Mahoney, Tr. 159; and Sorenson, Tr. 164) testified that in their opinion the defendant was sober and not drunk. Two of them, Kiefer and Sorenson, saw the defendant at the scene of the accident, and the other two a short time before when he drove up to have his wheel repaired. These witnesses had absolutely no interest in the controversy and took oath before the jury that they would tell the truth. The defendant denied that he was drunk and testified that he was sober when the accident occurred (Tr. 188).

That the defendant was operating his motor vehicle in a proper manner within the west-bound traffic lane

of the highway is best shown by the testimony of the plaintiff Orland Heald himself. He testified that he first saw the defendant's car when it was between fourteen hundred and fifteen hundred feet—more than a quarter of a mile—away (Tr. 121, 147). His car and the defendant's car were the only two cars in sight (Tr. 121). There was nothing out of the ordinary about the defendant's car that attracted his attention when he first saw it in the distance coming toward him (Tr. 127, 147). In addition plaintiff Martha Heald testified that she saw the defendant's car before the collision (Tr. 113) and she noticed it as she would notice any other car approaching. The defendant himself testified that he was traveling within his proper traffic lane (Tr. 187, 198).

The physical facts attending the collision are not in conflict. As defendant's car stood by the north culvert abutment after the collision the left rear wheel was missing (Tr. 18, 72, 90). The wheel was in the field one hundred feet north of the culvert and about twenty-five feet east of it (Tr. 68, 72, 83-84). There was no damage to the fence nor did it bear any tire marks (Tr. 84). There were marks in the field beginning directly north of the culvert ten feet beyond the fence into the field and ending where the wheel lay (Tr. 84-85). The wheel itself bore no marks of damage nor did the tire, which was inflated.

The defendant's car was the type on which each wheel is perforated by six holes arranged in a circle around the center of the wheel and the wheel is fastened to the axle drum by nuts. After the accident the nuts on defendant's left rear wheel were still on the bolts extending from the left rear axle drum (Tr. 106, 107, 108). The holes in the wheel were worn but undamaged (Tr. 108, 165) and the nuts used to clamp the wheel to the

axle drum could be passed through the holes (Tr. 108-109, 165) (for illustrations see defendant's Exhibit 1, Tr. 349).

The plaintiff Orland Heald testified that when the two cars were seventy-five or eighty feet apart the defendant's car veered over to the south side of the highway directly toward his car (Tr. 113) and the collision happened very suddenly (Tr. 145). The defendant testified that when the two cars were a short distance apart the back end of his (defendant's) car suddenly dropped (Tr. 186, 199-200).

Now, on the basis of this evidence, the question of the defendant's drunkenness was a fact issue. Certainly there was evidence on both sides. Secondly, it was the theory of the defense that even if the defendant was drunk on the occasion in question, there was no liability for that in the absence of negligence. And there is respectable authority for that proposition. *Wise* v. *Schneider,* 205 Ala. 537, 88 So. 662; *St. L., S. F. T. Ry. Co.* v. *Morgan* (Tex. Civ. App.), 220 S. W. 281; *Cleveland Ry. Co.* v. *Owens,* 51 O. App. 53, 199 N. E. 607; *Powell* v. *Berry,* 145 Ga. 696, 89 S. E. 753; *Sylvester* v. *Gray,* 118 Me. 74, 105 Atl. 815; *Simensky* v. *Zwyer,* 40 O. App. 275, 178 N. E. 422; *Bates* v. *Tirk,* 177 Wash. 286, 31 Pac. (2nd) 525; *Strang* v. *City of Kenosha,* 174 Wis. 480, 182 N. W. 741.

Thirdly, it was the theory of the defense that the proximate cause of the accident in question was the fact that the wheel came off and threw the defendant's car across the center line. There is no question but that the wheel came off and certainly the physical facts of the accident corroborate the defendant's testimony that it came off before the car lurched across the center line of the highway.

If that defense is dishonest, miserable, unfair, untrue and is a lie which will fit into nothing else but another lie causing counsel's blood to boil, then how do plaintiffs account for paragraph seven of Count I (Tr. 4) and paragraph six of Count II (Tr. 6) of their complaint, which charge the very same thing—that is, that the defective wheel becoming detached from the automobile caused the automobile to run onto the left side of the highway and come into collision with the plaintiffs' automobile.

The theory of the plaintiffs and the defendant is identical on this point as to the cause of the accident, the only difference being that the plaintiffs contend that the wheel came off by reason of negligence in inspection of the car, whereas the defendant contends that the inspection was adequate and the wheel came off without any fault on his part.

The plaintiffs in setting up that charge in the complaint anticipated, before the proceeding was filed and before the defendant had said anything, the possibility that their own proof would establish that the cause of the accident was the defective wheel coming off of the car. Yet, when the proof so shows, it becomes a "dishonest, miserable, unfair, untrue defense which will fit only into another lie."

Moreover, the plaintiffs contended on the trial that there was insufficient inspection of the car and that theory was presented to the jury. The Circuit Court of Appeals in its opinion stated that there was sufficient evidence to justify a recovery on that theory (Tr. 397-398).

The car had been inspected at the time it came into defendant's possession a week or ten days before the accident (Tr. 243). About two hours before the collision the defendant drove this car to the Oldsmobile

Garage in LaGrange, Illinois, where he asked a mechanic to investigate a creaking noise in the rear end of the car, which he demonstrated to the mechanic by driving his car backward and forward across the yard (Tr. 153, 158, 183). The mechanic located the noise in the left rear wheel (Tr. 155) removed the hub cap and tightened the nuts on that wheel with a wrench, all of which were loose about one turn (Tr. 153, 155, 158, 183). The mechanic by having the defendant drive backward and forward four or five times showed that the noise was eliminated (Tr. 154, 159, 194). The mechanic then told the defendant that the car was in proper shape (Tr. 154) and defendant did not detect a loose wheel at any time thereafter (Tr. 195).

It is a well settled rule that where a reasonable inspection fails to disclose a defect, the owner is not liable for injuries to other motorists on the public highways resulting therefrom. (*Delair* v. *McAdoo,* 324 Penn. 392, 188 Atl. 181; *Bolin* v. *Corliss Co.,* 262 Mass. 115, 159 N. E. 612; *Sennett* v. *Nonantum Coal Co.,* 284 Mass. 390, 187 N. E. 758; *Ormond* v. *Wisc. Power & Light Co.,* 194 Wisc. 305, 216 N. W. 489; *Cherry Lake Farms, Inc.* v. *Taylor,* 98 Fed. (2nd) 571.) This seems to be respectable authority for that proposition. Is it then dishonest, miserable, unfair and untrue to contend that the inspection and repair of the car by the defendant on two different occasions constituted reasonable and ordinary care and that what defendant did was what the ordinary reasonable man would do?

On the question of damages the evidence was very sharply in dispute. The plaintiff, Martha Heald, sued for $25,000.00 and Orland Heald for $10,500.00, and both claimed serious and substantial injuries. The plaintiff, Martha Heald, appeared in court on crutches, which both of the defense doctors, Conley (Tr. 226)

and Zeitlin (Tr. 274), testified to be unnecessary. Both of these doctors are outstanding men in their profession, Conley being the head of the orthopedic department of Oak Park Hospital and Chicago Memorial Hospital, and until the first of 1940 was head of the orthopedic surgery department at Cook County Hospital (Tr. 213). It goes without saying that a man does not attain such rank in his profession unless his ability and integrity is outstanding. Conley had examined both plaintiffs in advance of trial pursuant to order of Court under the applicable federal rule (Tr. 214). The question of plaintiff, Martha Heald's fractured acetabulum and whether the injury was permanent depended almost entirely upon X-ray interpretation, and Dr. Zeitlin is one of the outstanding men in Chicago on that subject, starting in 1924 in the Research X-ray department of Michael Reese Hospital and for five years in the X-ray department of Cook County Hospital, and in 1926 and again in 1932 attended the post-graduate X-ray school at the University of Vienna (Tr. 267). Was it dishonest, unfair and miserable for these doctors to testify as they did, one after an examination of the plaintiff and the other on the examination of the X-rays? And was it dishonest, unfair and miserable to contend on the basis of the testimony of these eminent orthopedic surgeons that the injuries were not as great as the plaintiffs would have the jury believe?

We have extended these remarks about the witnesses and the evidence so that this court might get a better view of the accusations leveled against everyone connected with the defense of this case by the plaintiffs. Obviously, the argument in question was not based on the evidence and was not an interpretation thereof, although the trial court and the Circuit Court of Appeals seemed to think that it fell in the category of infer-

ences drawn from the evidence by counsel. It is true, as the Circuit Court of Appeals says, that the evidence was not misquoted. The evidence was not referred to at all and there was not even an attempt to justify the accusation on the basis of the evidence.

The argument did not point out why any particular witness or all of the witnesses should be disbelieved; it did not show that any of the witnesses had been impeached by inconsistent statements; that their reputation for truth and veracity was bad; that they were interested in the outcome; that they were biased, that they were related to the defendant, or that they did not have the opportunity for seeing or knowing the things about which they testified. Neither did the argument point out with respect to any items of the evidence why it was improbable, why it was incredible, or why it was outweighed by other evidence. The argument was simply an accusation that all the witnesses for the defendant blandly came forth and for a consideration, or otherwise, testified out of the whole cloth. They were the principal actors in the "dishonest, miserable, unfair and untrue defense" although it is not clear who is meant by "then *they* come in with this dishonest, etc. defense." The statement certainly is broad enough to include counsel for the defendant.

This was not an easy case to defend in any event. The average juror is prejudiced against any motorist where there is testimony that he was under the influence of liquor. As a matter of fact most of us are. It is apparent that the language of plaintiffs' counsel in his closing argument to the jury might well fall upon sympathetic and approving ears. It is difficult for the jury under such circumstances to bear in mind the fact that there is no liability for intoxication where the intoxication does not cause the damage. But this was a

court of law, where the defendant, drunk or sober, was entitled to a fair and impartial trial on the evidence. It would seem that under the circumstances the greatest of care and circumspection in the handling of the case would be indicated for the plaintiffs in the place of the reckless abandon which was exhibited. And by these statements we do not mean to imply any criticism whatsoever of the trial court, for whose integrity and ability we entertain the highest regard.

In *New York Cent. Ry. Co.* v. *Johnson*, 279 U. S. 310, 49 Sup. Ct. 301, plaintiff's counsel in the argument to the jury in very violent language made repeated references to an infamous disease. The argument was based upon the assertion that the defense claimed that plaintiff's injuries were due to such disease. The line of inquiry had been opened up by the cross-examination on behalf of the defendant but nothing was developed, it was abandoned and the defense disclaimed the point. In discussing the propriety of the remarks of plaintiff's counsel, this court held that the cross-examination was within the rights of the defendant and stated, page 317:

> "However ill advised, counsel for petitioner was within his rights in following this line of inquiry and even if it be assumed that the situation was one calling for comment on the evidence so elicited, neither petitioner nor its counsel was on trial for pursuing it."

So here. We believe that the only explanation for the collision in question was that it was proximately caused by the wheel coming off the defendant's car. Even if that were not so, certainly the defendant was within his rights in asking an opportunity to be heard in a dispassionate manner according to established rules of law and procedure. As was said in the *Johnson* case cited above, in the case at bar neither the defendant nor his counsel nor the witnesses who testified for the defend-

ant were on trial for asking for an opportunity to be heard and certainly this is not a ground for a verdict in the plaintiffs' favor or for enhancing it. Moreover, in the *Johnson* case, the question was not saved for review, but this court held, page 318:

> "The public interest requires that the court, of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by appeals of counsel to passion or prejudice."

It was also complained of in *New York Central Ry. Co.* v. *Johnson,* 279 U. S. 310, 49 Sup. Ct. 301, that in the argument plaintiff's counsel asserted, among other things, without supporting evidence, that the defense was a "claim agent defense." In discussing these remarks, this court stated, page 319:

> "Such remarks of counsel and others of similar character all tending to create an atmosphere of hostility toward petitioner as a railroad corporation located in another section of the country, have been so often condemned as an appeal to sectional or local prejudice as to require no comment."

In *Rouse* v. *Burnham,* 51 Fed. (2nd) 709, the defendant and appellant, who was a practicing physician, was called a "crooked doctor," that his "word was worth nothing." Another appellant, Greggory, was referred to as having "all the earmarks of a common, ordinary, enthusiastic liar." Of another, Dawson, plaintiff's counsel stated that he "lied on the witness stand." Of all of the witnesses for the appellants, plaintiff's counsel stated that "they come on the witness stand and every last one of them perjures himself in order to save these rascals and scoundrels a few dollars, every last one of them." In holding these remarks in an argument to the jury to be reversible error, the Tenth Circuit said on page 713:

> "We find nothing in the record to justify these remarks, and, if they had been true, they were not matters for consideration by the jury. There was no rebuke at any time from the court, and the jury must have thought that the argument was an appropriate one, else the court would not have permitted it. The verdicts of the jury in the total sum of $24,000.00 is evidence of aroused prejudices against the defendants. Conduct of plaintiff's counsel was not only improper, it was reversible error. It is the duty of the court of its own motion to protect litigants from abuse by opposing counsel. *New York Cent. R. R. Co.* v. *Johnson,* 279 U. S. 310, 318, 49 S. Ct. 300, 73 L. Ed. 706."

In *Mattic* v. *Klowans,* 312 Ill. 299, an attorney in his argument to the jury remarked that a certain physician testified as he did for the defense because the defendant's counsel "got to him first." The court held that the argument inferred that the doctor gave biased testimony because the defendant had influenced him and held the remark to be prejudicial error. See also *C. & A. R. R. Co.* v. *Scott,* 232 Ill. 419, 421, 422; *Bishop* v. *Chicago Junction Ry. Co.,* 289 Ill. 63, 69; *Appel* v. *Chicago City Ry. Co.,* 259 Ill. 561, 567, 568; *Crosby* v. *Minneapolis St. P. & S. S. M. Ry. Co.* (N. D.) 237 N. W. 803, all to the same effect.

In *Norfolk & W. Ry. Co.* v. *Eley,* 152 Va. 773, 148 S. E. 678, in his closing argument to the jury plaintiff's counsel said that the witness for the railroad company, being an employee of the railroad company and being charged with fault, would not testify any other way than the way that they did because of the fear and apprehension of discharge and suspension and that a person charged with fault always denies it. The court held that there was no evidence in the record justifying the assumption that the witnesses testified under the influence of the desire to retain their positions, that the

accusation was a direct impeachment of their integrity and witnesses could not be impeached in that manner. The court further held that it was impossible to measure the harmful effect upon the jury of the statement, not as a matter of opinion but as a matter of fact that the "bread and meat" of the witness and his family were dependent upon the giving of false testimony.

In that case it was further held that the failure of the trial court to sustain an objection to the remarks added further prestige to the statements and caused further harm. In this regard the court says (148 N. E. on page 679):

> "In addition to the great weight which the jury must have attached to the statement of the learned counsel that the alleged false testimony was the result of necessity is superadded the prestige of the court in giving its approval to the language employed. There is no legal tape with which we can measure the resultant harm when counsel wander too far outside the record. The harshness of a verdict in a criminal case or the exorbitant amount of damages awarded in a civil case may be the criterion applicable to a particular case, but this rule is not exclusive. When it is made to appear that a litigant has not been afforded a fair and impartial trial, this court will overlook technical refinements and remand the case for a new trial."

This court has held the same in the case of *New York Cent. Ry. Co.* v. *Johnson*, 279 U. S. 310, 49 Sup. Ct. 301, referred to above herein. In that case this court says, page 318:

> "Such a bitter and passionate attack on petitioner's conduct of the case, under the circumstances tending to stir the resentment and arouse the prejudice of the jury should have been promptly suppressed. The failure of the trial judge to sustain petitioner's objection or otherwise to make certain

> that the jury would disregard the appeal could only have left them with the impression that they might properly be influenced by it in rendering their verdict and thus its prejudicial effect was enhanced." (Citations omitted.)

So here. The effect of the objections to the argument being overruled by the trial court, while not intended to do so at all, could have only the effect of lending the court's prestige to the statement and conveying to the jury the thus enhanced opinion that the defense was "dishonest, miserable, unfair and untrue" that it was a lie which would not fit into anything but another lie and that the blood of plaintiff's counsel boiled justifiably upon being compelled to sit and listen to it.

In addition plaintiffs' argument (Tr. 294) also requested the jury to "treat this little lady from a sister state the way you would want to be treated if you were a party to this litigation and the lawyers will have to be satisfied." There was only one "little lady from a sister state" and that was the plaintiff Martha Heald. This certainly is a direct invitation to the jury to put themselves in the position of the plaintiff and then the gentlemen who are conducting the "dishonest, miserable, unfair and untrue defense" will have to be satisfied with the result accruing from the jury taking the side of the plaintiff. Obviously, this is an appeal to the sympathy of the jury and an effort to prejudice the defendant. Such arguments have been repeatedly held to be improper. *Thomas* v. *Ill. Power & Light Corp.*, 247 Ill. App. 378, 388; 64 C. J. 280, Sec. 298, n. 47(a), and cases cited.

Under the authorities cited the argument in question constitutes reversible error and we respectfully submit that it is such a departure from the accepted and usual course of a judicial procedure as to call for an exercise of this court's power of supervision.

II.

The admission by the trial court of the defendant's arrest, incarceration and prosecution following the accident in question constituted error of such a prejudicial nature as to preclude the possibility of a fair trial upon the issues.

During the testimony of the witness James J. Smith, a constable who came upon the scene of the accident shortly after the occurrence, he was asked upon direct examination for the plaintiff to state whether or not the defendant was then intoxicated. His answer was that in his opinion the defendant was intoxicated. Thereupon the following occurred (Tr. 20, 21):

> "Q. Did you take any action about the condition of this man Milburn?
> Mr. Sears: I object.
> Mr. Ryan: Q. Did you do anything about him when you took him to the jail?
> Mr. Sears: We object to that.
> The Court: Objection sustained.
> Mr. Sears: And we move for leave to withdraw a juror because of the prejudicial effect of the question. It can only lead to one inference.
> The Court: Objection overruled."

While the court was right in sustaining the objection the inference was there, and counsel should have at least refrained from any further inquiry on that point in view of the court's ruling. But that is not what transpired at all. Harry Crawford, a Deputy Sheriff of Kane County, was called by the plaintiff, and the following occurred (Tr. 29):

> "Q. And where were you located?
> A. In the Kane County jail, Geneva, Illinois.
> Q. Were you there in the afternoon when Mr. Smith came there with Mr. Milburn?
> Mr. Sears: I object to this type of evidence.

The Court: Overruled.

A. I was.

Q. Were you there in the afternoon when Mr. Smith came there with Mr. Milburn?

Mr. Sears: I object to this type of evidence.

The Court: Overruled.

A. I was.

Mr. Ryan: Q. About what time did Mr. Smith bring Mr. Milford there?

A. Oh, it was shortly—

Q. Milburn, rather.

A. Shortly after three o'clock.

Mr. Sears: I object to this, your Honor, on the ground you cannot show this matter in a civil proceeding, and, on the further ground, that we were taken by surprise on the evidence of this sort as not being within the scope of the pleadings.

Mr. Ryan: Your Honor, I object to the statement that counsel is taken by surprise, and move it be stricken.

The Court: Your objection will be overruled." (Tr. 30.)

"Mr. Ryan: Q. Mr. Crawford, did you have any conversation with Mr. Milburn, did you get close to him, and tell us what your contact, if any, was with him when he came into the jail?

A. Well, the radio operator in the jail there is, you might say, like a desk sergeant would be in the City of Chicago and other large cities. When they bring a person in he usually books him.

Mr. Sears: We object to this evidence as not responsive to the question.

The Court: Yes, objection sustained.

Mr. Ryan: Q. I don't know whether—Mr. Crawford, perhaps you didn't understand. My question may not have been plain. Will you tell us what conversation you had with Mr. Milburn when you saw him and got close to him? Tell us about this.

A. They brought him into the jail there and sat him down.

Mr. Sears: I object. It is repeated and repeated.

The Court: No. The question is, I presume to describe him."

Notwithstanding our objection, the evidence is nevertheless before the jury that the defendant was arrested by Smith, taken to the Kane County jail at Geneva and booked. This court can well appreciate the effect such testimony has upon the jury which is to consider the issue of the defendant's intoxication when it appears clearly that immediately after the accident he was arrested and brought to jail.

To offset the prejudicial effect of this inadmissible evidence and to rebut the inference to be drawn from the evidence, we thereupon inquired to determine whether the defendant had ever been tried on the charge (Tr. 188). The defendant, however, was not permitted by the court to state that he had never been tried upon the charge of driving a car while intoxicated on the ground that his testimony was not the best evidence. Notwithstanding such ruling the defendant on examination was interrogated by plaintiffs' counsel with respect to his being taken before a Justice of the Peace, that he waived examination, was bound over to the Grand Jury, required to furnish bond, and that the case was finally *nolle prossed* by the State's Attorney (Tr. 203); and the attempt was further made to establish that the action of the State's Attorney in discontinuing the charge was the result of a charitable action of the plaintiffs, as follows (Tr. 203):

> "Q. And you knew the reason for that was that Mrs. Heald—
>
> Mr. Sears: Just a minute, now, we object to this sort of cross-examination. The record is the best evidence and we can't impeach the record.
>
> The Court: He may ask that question.
>
> Mr. Ryan: Q. Don't you know, sir, that upon advice of their attorneys that Mr. or Mrs. Heald did not want to take any part in your prosecution on the criminal charge, that they were advised by their attorneys not to do it, and that they had no idea of being vindictive about this thing at all?

Mr. Sears: We object to the form of the question.

The Court: The form of the question is bad. The form is bad.

Mr. Ryan: Q. Well, the state's attorney did *nolle prosse* the case?

A. Yes."

The question was never answered, of course. Yet, the long statement by counsel is in the record and the inference is plainly made that the action of the State's Attorney was taken at the direction of the plaintiffs.

We thereupon produced the Clerk of the County Court of Kane County and offered in evidence the original record showing that the case had been *nolle prossed* by the State's Attorney (Tr. 206, 207, 208). This was, in fact, an information started by the State's Attorney in the County Court of Kane County on the charge of driving while intoxicated after the bind-over to the Grand Jury.

Nevertheless, plaintiffs' counsel in an apparent effort to leave the jury with the impression that other criminal prosecutions were pending against the defendant (which was not the fact) cross-examined the deputy clerk (Tr. 208, 209) in an attempt to show that he was the clerk only of the County Court, that the Grand Jury was an official body of the Circuit Court to whom the defendant had been bound over, that his testimony related only to the County Court proceeding, and that he knew nothing about what had transpired either in the Justice Court or the Circuit Court (Tr. 208, 209). Immediately thereafter the following colloquy occurred which further establishes the hope that the jury should infer other proceedings were pending (Tr. 210):

"Mr. Sears: I want to clarify it, Mr. Ryan wants to leave the impression there are still some proceedings pending against him.

Mr. Ryan: No, I want to leave the impression as to what was done in this case. You seem to want to invade the—

Mr. Sears: You will agree that there are no proceedings pending out there?

Mr. Ryan: I am not making any agreement with you. The record shows the state's attorney entered a *nolle prosse* and that is all.

The Court: Are you through?

Mr. Sears: That is all."

Not satisfied with such status of the record, the plaintiffs came back in rebuttal and sought to leave the impression with the jury that the dismissal of the criminal prosecution by the State's Attorney was the result of their charity, and that the action of the State's Attorney was taken because they did not desire any prosecution (Tr. 281, 282). Although at this time an objection was sustained, nevertheless there is no doubt that through the constant repetition and reiteration the jury were left with the inference that the defendant was so drunk that he was promptly arrested, and only through the intervention of the plaintiffs was he saved from a just punishment.

Then to really impress the jury that the criminal prosecutions were important right at the close of the plaintiffs' case they offered in evidence the state warrant, the complaint and *capias* (Tr. 282). In view of the trial court's rulings no objection was made by the defendant inasmuch as an objection would only have the effect of impressing still further on the minds of the jury the probable importance of the documents in question. To sum up the situation, the record shows that in the first instance, when it was attempted by the plaintiffs to prove the arrest, and the fact that the defendant was taken to jail, the court sustained the objection. But it is all before the jury, nevertheless.

It was bad enough to have to try the present case without having also to try the criminal case. It is, of course, apparent that it is of considerable aid to a plaintiff if he can get before a jury the fact that the defendant he is suing was arrested on the spot by a police officer and taken to a jail, booked and incarcerated. And this court can well imagine what effect this testimony has upon the jury. Immediately, they surmise that he must have been drunk or he would not have been arrested and taken to jail. Yet that was the issue which the jury was to decide. They might consider that fact as the most important fact on the question of his drunkenness, namely, that the police officer, whose duty it was to enforce the law, did so by immediately arresting and incarcerating the defendant. Whether he was intoxicated or not was a disputed question, and credible disinterested witnesses testified that he was sober. Others testified that he was drunk, and his arrest and incarceration may have been the very item of evidence that induced the jury to believe that he was drunk. The damages awarded are substantial, particularly when one considers the fact that the injuries which plaintiffs claimed were sharply and seriously disputed by defendant who offered testimony of two reputable and outstanding doctors on that subject (Tr. 212-242; 266-281) which directly refuted plaintiffs' more serious claims of injury.

In *Chicago City Ry. Co.* v. *Uhter,* 212 Ill. 174, which appears to be the leading Illinois Supreme Court case on this subject, a policeman who witnessed the accident and testified for the defendant, was asked by plaintiff's counsel on cross-examination facts which brought out that he took the motorman and conductor of the defendant's train which caused the injury in question into his charge or, in other words, arrested them. Objections were made and overruled, and the testimony went

to the jury. In holding this to be error the Supreme Court of Illinois through Mr. Justice Magruder, said (p. 182):

> "This evidence in regard to the arrest was improperly admitted by the trial court. There was no charge of wilful and wanton conduct on the part of the motorman and conductor in the declaration, but only a charge of ordinary negligence on the part of the company. The admission of this evidence tended to make the impression upon the minds of the jury, that the motorman and conductor had been guilty of committing an act, which was criminal in its nature, and as the verdict of the jury, before its reduction by a *remittitur,* was $12,500.00, it may be that the jury came to the conclusion, in view of this evidence, that they had a right to award punitive damages."

It might be argued that this case is not in point for the reason that in the case at bar there is a charge of wilful and wanton misconduct. We know of no rule permitting the evidence when there is a charge of wilful and wanton misconduct, but, on the contrary, if the defendant in the case at bar had been convicted of a charge of driving his car while under the influence of liquor, such conviction would not have been admissible. This is borne out by *Cammerano* v. *Gimino,* 234 Ill. App. 556, which was an action for assault and battery of which malice is peculiarly the gist. In that case plaintiff offered in evidence a record of the conviction of the defendant in a criminal prosecution—for the same assault and battery. The First District considered the matter thoroughly (see p. 559 of opinion, *et seq.*) and concluded that the admission of this criminal record constituted reversible error. It was the only point decided by the court, and while it is an Appellate Court opinion, as distinguished from a Supreme Court opinion, nevertheless it was the duty of the trial court and Cir-

cuit Court of Appeals to follow it under the doctrine of *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, decided December 9, 1940, wherein this court held that it was the duty of the Federal courts under the *Erie* case to follow the decision of the intermediate Appellate state court,—there an opinion of the Court of Appeals of Ohio.

Chicago City Ry. Co. v. *Uhter*, 212 Ill. 174, cites as authority for its holding *Luby* v. *Hudson River Railroad Co.*, 17 N. Y. 131, which was an action for damages as a result of plaintiff being struck by one of defendant's cars while crossing a street in the City of New York. On the trial, evidence was allowed to be given by a police officer, against the objection of the defendant that he arrested the driver of the car. The Court of Appeals held that the fact of the arrest was irrelevant and may have improperly influenced the jury in their judgment, reversing the case, and saying (p. 132):

> "In regard to the arrest. That fact was irrelevant to the case, and we cannot tell what influence it may have had upon the minds of the jury. It is true that the jury ought not to attach any importance to the circumstances in trying the issue before them, but this only proves that this fact ought not to have been shown for their consideration. It certainly has some tendency to prove that at the very time of the transaction the defendant's driver was considered by the officer and others as guilty of culpable negligence. The question of his negligence was in issue and on trial; and how far the jury were aided in their conclusion by the manner in which the driver was treated by a police officer or others who witnessed or were near the transaction, it is impossible for us to say. There is no pretense for saying that this evidence was necessary or proper, for the purpose of identifying the occasion."

Likewise in the case at bar there is no pretense for saying that this evidence was necessary or proper for the purpose of identifying the occasion. The witness Smith had already testified that in his opinion the defendant was intoxicated before any testimony was elicited from him to the effect that he arrested the defendant and took him to jail. The witness Crawford could have testified that he saw the defendant on the day in question and that, in his opinion, the defendant was drunk without any reference to the place where he saw him or without any reference to the fact that he was booked on a charge of driving a car while intoxicated. The evidence that he was bound over to the grand jury, that capias was issued for his arrest, and information filed by the State's Attorney, and that he was required to furnish bond was no evidence of his intoxication. It would not even be evidence in a criminal case.

Neither may it be said that there has been a waiver of the point. While it is true that the defendant did attempt to counteract this prejudicial and inadmissible testimony introduced by the plaintiff, he had a right to do so. The plaintiffs were attempting to leave the inference that the prosecutions were still pending and that the defendant was still to be punished, thereby corroborating the constable's and deputy sheriff's opinion as to the propriety of criminal action. The fact was that there were no criminal prosecutions pending and that the defendant had never been convicted. Certainly he had a right to show this. The trial court made the issue when he overruled repeated objections to evidence relating to the defendant's arrest and subsequent incarceration. The rule is well settled that a party has a right to meet a plaintiff's case as made under the rulings of the trial court and after making the objection has a right to combat the testimony whether cor-

rectly admitted or not without losing any right on appeal. *Chicago City Ry. Co.* v. *Uhter,* 212 Ill. 174, 181

In that case the trial court permitted the plaintiff to offer over the objection of the defendant evidence of witnesses to the effect that they had never heard of the plaintiff having certain ailments prior to the time of his injury. Thereupon defendant asked some of his witnesses questions of the same character, and it was argued on appeal that defendant had waived its origina objection to the admission of this evidence by introduc ing evidence of the same character. In holding tha defendant did not waive its objection the Supreme Cour of Illinois, quoting from a Texas case, said on page 181

> "It is contended, however, that after the admis sion of the objectionable evidence, defendant also offered proof upon the matter, and is, therefore estopped to complain. We do not think this conten tion sound. A defendant has the right to meet th plaintiff's case, as made under the rulings of th trial judge, and, after making objection and reserv ing proper exceptions, may combat the testimon of plaintiff, whether correctly admitted or not without losing his rights on appeal."

To the same effect are *Teter* v. *Spooner,* 279 Ill. 39, 4 47; *Winn* v. *Christian Co. Coal Co.,* 156 Ill. App. 17 182; *Phila. Rap. Tran. Co.* v. *Coast Fir & Cedar Pro Co.,* 241 Ill. App. 320, 326; and *Warszawa* v. *White Eag Brewing Co.,* 299 Ill. App. 509, 516.

There is only one Appellate Court case in the Stat of Illinois which is not in line with the other Suprem and Appellate Court decisions. This is the case *Chicago City Ry. Co.* v. *Reddig,* 139 Ill. App. 160, whic contains a statement that evidence of arrest is prope However, the point was not presented and is not di cussed by the court and is pure *dictum.* The real hol ing in that case was that after a showing is made of a

arrest it is error to exclude the reason therefor. It cites *Chicago City Ry. Co.* v. *Uhter,* 212 Ill. 174, and states as its essential holding, that unless the reason for the arrest is permitted, the evidence of arrest would be calculated to leave an impression in the minds of the jury that there was something culpable in the conduct of the person arrested at the time of the accident which brought it about. In other words, in that case the reason for the arrest was permitted in order to get away from the possibility that a jury would infer blame on the person arrested. It is the very point which we have been contending for and which the other cases announce as well, that the issue of culpability is to be determined by the jury in the civil case and not by a police officer on the scene of the accident.

Moreover, the *Reddig* case was decided in 1908 by the First District Appellate Court of Illinois and was followed in 1924 in the same district by *Cammerano* v. *Gimino,* 234 Ill. App. 556, referred to above herein, an exhaustive opinion on the subject which decided only the point in issue. If any question existed with respect to the meaning of the opinion in the *Reddig* case, that question has been eliminated by the later opinion by the same court.

Therefore there can be no question of the law in the State of Illinois with respect to the admissibility of evidence of arrest of a party involved in an accident, in an action growing out of the accident. Such evidence is definitely not admissible in Illinois, and we respectfully submit that the admission of this testimony had a prejudicial effect on the defendant's case on the issue of his intoxication and constitutes reversible error, and the decision of the Circuit Court of Appeals holding such evidence to be admissible is in conflict with the local applicable decisions.

CONCLUSION.

This court has frequently held that even the guilty are entitled to a fair trial in accordance with the established law and the procedure of our courts. Time after time this court has stated that there is not one rule of procedure for the innocent and another for the guilty.

An examination of the record in this case cannot fail to disclose the undue prominence which was given to the issue of the defendant's drunkenness and the evidence of the details of his arrest, incarceration and partial prosecution. This issue was in reality a very minor issue in the case for the real issue was the operation of the defendant's motor vehicle. We have shown that even on the testimony of the plaintiff that operation was at a reasonable speed and in a proper manner until the rear end of his car dropped—that is, until the wheel came off. We have also shown that even the plaintiffs' complaint is drawn on the theory that the wheel coming off was the cause of the accident. The issue then becomes a question whether or not there was reasonable and adequate inspection—inspection over a period of ten days, during which time the defendant owned the car, and on the morning of the day of the accident. At these times there is no showing that the defendant was drunk at all, and of course if a failure of inspection is the basis for the judgments in this case, then the defendant's drunkenness on the scene of the accident is not even relevant or material.

What we consider to be the most important question in this case and which particularly this court ought to consider is the possibility of a calm, cold, dispassionate consideration of the issues in this case by the jury in the atmosphere of and against the background of the

defendant's immediate arrest by the constable, his incarceration by the Sheriff, his bind-over by the Justice of the Peace and prosecution by the State's Attorney. How could the jury calmly consider whether the defendant, for a period of ten days prior to this occasion, should have more carefully inspected the car? How could the jury under these circumstances carefully and dispassionately consider the facts with respect to the manner in which the defendant's car was being driven?

When added to this prejudicial background you have a blanket indictment of everyone connected with the defense, charging them with perjury, dishonesty and untruth, which, although without foundation, receives the inadvertent but apparent approval of the trial court, by the overruling of objections it becomes apparent that this is not a case where it can be said the errors were harmless.

Who can measure the effect upon the jury of such error? The injuries were very seriously questioned in this case, yet the verdicts are substantial. Who can say that it was not the prejudicial evidence of arrest and the prejudicial charge of dishonesty that were the very factors causing the verdicts? How easy for the jury to assume from the action of the officials that the defendant was drunk, and since he was in an accident while drunk he should repair the damage. How easy, in other words, for the jury in this case to accord to the issues in this case not the fair, calm, dispassionate judgment of a fair trial but the assumptions, the prejudices and the passionate feelings of "a dishonest, drunken man's" trial.

Respectfully submitted,

BARNABAS F. SEARS,
Attorney for Petitioner.

(21)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

Nos. 1104-1105

WILLIAM MILBURN,

Petitioner,

vs.

MARTHA HEALD and ORLAND HEALD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER OF THE RESPONDENTS TO THE PETITION FOR WRIT OF CERTIORARI.

JOSEPH D. RYAN,

Counsel for Respondents.

CHAMPLIN-REHALY COMPANY, CHICAGO 265

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

Nos. 1104-1105

WILLIAM MILBURN,

Petitioner,

vs.

MARTHA HEALD and ORLAND HEALD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER OF THE RESPONDENTS TO THE PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals in this case was filed January 13, 1942, appears as *Heald* v. *Milburn*, 125 Fed. (2) 8, and is set out in the Record herein, beginning at page 392.

STATEMENT OF THE CASE.

The pleadings are set out rather fully in the Petition, pages 2 and 3. As we understand it, however, there is no point on the pleadings; we will refrain from discussing them.

Petitioner, a used-car dealer, had been out all morning going from one automobile sales yard to another; during his morning's travels he had done considerable drinking and by 2:15 p. m., the time of the accident, he was definitely intoxicated. He was driving an old secondhand car, which had been submitted to a superficial examination by a mechanic in his employ (Tr. 243); apparently, since no radical defects appeared to the casual glance and the car could be run three or four miles, it had passed the test, and thenceforth could be operated at will. The mechanic testified that the defect which was evident when the car collided with respondents' car could have been discovered at the time of his examination, if he had taken the trouble to remove a wheel, but since "by the time you stop and do that to several hundred cars during the year it means a lot of time" (Tr. 246), nothing of the kind was attempted and petitioner used the car, knowing nothing about its condition except that it was able to run (Tr. 191, 192).

Not long prior to the accident, the petitioner's attention was attracted to a noise in his car; he stopped at a used-car yard and had the nuts on the left wheel tightened. He started to do the work himself, but let a mechanic finish it for him (Tr. 183, 184). He stood right beside the man while the work was done and watched him do it (Tr. 194).

It was proved initially by the respondents (Tr. 108, 109) and later admitted by the petitioner that the nuts which fitted on the hub bolts were "all worn off" (Tr. 245) and so small that they permitted the wheel to fly off (Tr. 165), leaving the nuts on the hub (Tr. 245). The nuts, perforce, must have been smaller than the holes over which they were applied (Tr. 156). If they were so much smaller that they would pull through the holes without damage, this unsafe condition must have been apparent to the mechanic who was tightening them; yet neither the mechanic (Tr. 155, 156) nor the petitioner (Tr. 195, 196) would admit discovering anything amiss, although, according to their testimony, they were working on the identical wheel a few hours before the accident. The petitioner testified that he didn't even look to see (Tr. 195, 196).

Petitioner asserts, page 6, that: "When the two cars were about seventy-five to eighty feet apart, the rear end of the Milburn car suddenly dropped and in the same instant the car veered south of the center line toward the Heald car." Petitioner seeks to convey the impression that the foregoing facts are undisputed, since he makes no mention of any proof to the contrary. The fact is, however, that the foregoing testimony was absolutely and flatly contradicted by respondent Orland Heald (Tr. 146), who swore positively that the rear of the Milburn car did not drop prior to the accident. Even the petitioner qualified his story by saying that: "The back end of the car fell, apparently, and after that I don't know what happened" (Tr. 186).

The best that can be said for petitioner is that the testimony on this point was in conflict; the jury believed respondent. Their decision on this question of fact should not be disturbed.

Even had the jury reached the conclusion that this insecurely attached wheel became wobbly or out of alignment, thereby causing the car to sway and run onto respondents' side of the road, petitioner would still be liable under the undisputed evidence. He admitted that he knew nothing at all about the condition of the car (Tr. 191, 192) and that after he became aware that it was unsafe and that he heard a rattle in the wheel, as he reported to one of his witnesses (Tr. 158), he didn't take the trouble to look at the wheel while it was being repaired (Tr. 195, 196). Had he done so and had he been sober at the time, he could not have failed to observe that it was in a dangerous and unsafe condition for use on the public highway.

The cause of this accident was the drunken condition of the petitioner. The accident happened on respondents' side of the road and petitioner, in driving his car on the wrong side of the center line, was where he had no business to be. He was profanely and abusively drunk. He was staggering, his eyes were bloodshot, he boasted that he was drunk (Tr. 20). He was talkative, silly; his face was flushed and he was unable to walk without staggering (Tr. 42). He admitted having had seven drinks of whiskey (Tr. 31). He started to swear and refuse to state his name (itself a violation of Illinois law); he got out of his car, looked at it, got back in, said: "Sure I can get out," started the motor and raced it "sky high" and all this when his car lacked one wheel and was in the condition shown by Deft. Ex. 1, Tr. 349. He talked incoherently, said that he was drunk, that he was going to die, and wound up with the request that he be killed (Tr. 85). He asked Orland Heald who had hit him; he said he was drunk for the first time in years; he boasted of the standing and connection of his wife in the churches in the neigh-

boring town of DeKalb; he produced his wallet and offered it to respondent to pay the damages (Tr. 124). His drunken condition was testified to by a police officer (Tr. 20), a deputy sheriff (Tr. 31), a physician (Tr. 41), a farmer's wife (Tr. 77), a farmer (Tr. 85), as well as the respondent Orland Heald (Tr. 124).

He was arrested for drunken driving, but the charge was later nolle prossed (Tr. 207).

GROUNDS FOR JURISDICTION.

This is not a case of public importance. It does not involve a federal statute. There was no departure by the Circuit Court of Appeals from the "accepted and usual course of judicial procedure." Nor was the decision of that court in conflict with applicable local decisions. On the contrary, that court strictly followed and applied the Illinois statutes and decisions.

ARGUMENT.

I.

OUR REMARKS TO THE JURY WERE LEGITIMATE COMMENT ON THE EVIDENCE AND THE ISSUES. THE TRIAL COURT OVERRULED OBJECTIONS TO THEM; ITS ACTION IS NOT SUBJECT TO REVIEW EXCEPT FOR GROSS ABUSE OF DISCRETION, WHICH IS NOT CHARGED HERE.

Petitioner asserts that his rights were prejudiced, and irreparable error was committed, by certain excerpts from our argument to the jury.

We called the defense "dishonest, miserable, unfair and untrue." We went further and called the defense a lie.

Our characterization of the defense was apt, though perhaps not pleasant for petitioner to hear. If there was one fact in the case which was abundantly, overwhelmingly proved, it was that petitioner was drunk when he ran into respondents' car. As we have seen, this fact was proved by five wholly disinterested witnesses. At the time of the accident it was freely admitted by the petitioner (Tr. 20, 31, 42, 85, 124). At the time of the trial, however, he apparently thought better of it and completely changed his attitude, since we find him offering the specious objection to proof of his intoxication that the issue was not raised by the pleadings (Tr. 13-15). His argument in this connection was so farfetched that the trial court was impelled to ask him: "Are you really serious?" (Tr. 15). To cap the climax, petitioner a little later objected to this line of proof on the ground that he was "taken by surprise" (Tr. 29).

Under Illinois law, which is controlling in this case, evidence of drunkenness is admissible and material on the question of liability.

In *Reed* v. *Alton Water Co.*, 301 Ill. App. 219, plaintiff was a passenger in the car of a man who was intoxicated, behaved much in the same manner as the instant petitioner, and was taken to jail and locked up until morning. In affirming a judgment for the defendant, the court held, page 223, that whether the driver was under the influence of liquor was a fair question for the jury. After reciting the various evidences of intoxication, the court said, page 223:

> "All these various circumstances constituted abundant proof to justify the jury in finding that Hewey was drunk at the time of the accident."

Similarly, in the case of *Besserman* v. *Hines*, 219 Ill. App. 606, the court held that intoxication, both on the part of the plaintiff's decedent and of the driver of the machine in which he was riding, constituted negligence as a matter of law and reversed a judgment for plaintiff with a finding of fact that his decedent was guilty of contributory negligence.

Petitioner's "respectable authority," for the proposition that drunkenness should not enter into the case and does not impose liability in the absence of negligence, does not embrace any Illinois cases. The Illinois law is as indicated in the two cases above cited. The following cases from other jurisdictions hold that drunkenness is a material factor on the question of negligence and may be considered along with other circumstances in detemining the issue: *People* v. *Townsend*, 214 Mich. 267, 183 N. W. 177; *Southern Traction Co.* v. *Kirksey*, 222 S. W. 702 (Tex. Civ. App.); *State* v. *Kline*, 168 Minn. 263, 209

N. W. 881; *Bray-Robinson Co.* v. *Higgins,* 210 Ky. 432, 276 S. W. 129; *Steinkrause* v. *Eckstein,* 170 Wisc. 487, 175 N. W. 988; *Peveto* v. *Smith,* 113 S. W. (2d) 216 (Tex. Civ. App.).

Several of the cases cited by petitioner announce the same doctrine, notably *Wise* v. *Schneider,* 205 Ala. 537, 88 So. 662, 663; *St. Louis S. F. & T. Ry. Co.* v. *Morgan,* 220 S. W. 281, 282; and *Powell* v. *Berry,* 145 Ga. 696, 699.

We do not propose to analyze the evidence, or to discuss the nature and extent of respondents' injuries. All these questions have been settled by the courts below. We do not even care to comment on the fairness of petitioner in asserting in this court (Pet. p. 19) that our argument did not contain various things which he points out. Petitioner did not print our argument, except in two isolated parts, nor did he make this attack on it in the court below.

We said that the defense of sobriety was unfair and untrue. Our evidence proved exactly that. But this was not the only part of the defense which merited such condemnation.

Petitioner claimed that he was taken by surprise when we proved his intoxication (Tr. 24); this position assumed by petitioner was one which the trial court itself could not believe was serious (Tr. 15).

Petitioner asserted, as a part of his defense, that our cross-examination of one of his witnesses was purposely kept inaudible, so it could not be heard by the jury (Tr. 293).

Petitioner charged that we failed to produce one witness, Mrs. Jackson, who had been in our office with other witnesses, because she would not testify that petitioner was drunk (Tr. 292).

Petitioner said that respondent Orland Heald, who was a court reporter in Nebraska, had "seen more plaintiffs walk out with more money wearing crutches than plaintiffs who walked in without crutches" (Tr. 293).

We submit that the foregoing trivia, all taken from the record in this case, are something that should find no part in any lawsuit. When a defendant seeks to hide behind them, we submit that his defense is false and untrue and justly merits that characterization.

We might add that our reference to "a little lady from a sister state" (Pet. p. 12) was in reply to the obvious attempt by petitioner to arouse sectional prejudice, when he made the derogatory remarks above quoted about respondent Orland Heald, who was a court reporter "out there in Nebraska" (Tr. 293). Litigants are entitled to the same measure of justice, whether coming from Nebraska or Illinois.

Our remarks were fair comment on the issues, and we were entirely within our rights in arguing as we did. The trial court overruled petitioner's objection, and sustained our right to discuss the evidence and draw our conclusions. The courts have always accorded to litigants the right to the fullest discussion of the facts. In *Commonwealth Electric Co.* v. *Rose*, 214 Ill. 545, the court said, pp. 561, 562:

> "Counsel may arraign the conduct of the parties, and impugn, excuse, justify, or condemn motives, so far as they are developed in evidence, or assail the credibility of witnesses when it is impeached by direct evidence, or by inconsistency, or incoherency of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances. 'He may argue such conclusions from the testimony as he pleases, provided he does not misquote witnesses.' (2 Ency. of Pl. & Pr. p. 716). It has been said: 'Just and fierce invective, when based upon the facts in evi-

dence and all legitimate inferences therefrom, is not discountenanced by the courts.' (2 *id.* p. 747)."

In *North American Restaurant* v. *McElligott,* 227 Ill. 317, the following expression is used, p. 327:

> "Much complaint is made of statements of counsel for appellee in his argument to the jury. He characterized the defense that the wrong restaurant company had been sued as a fake and fraudulent one. Counsel must be permitted to draw such deductions from the evidence as are within reason, and we see nothing improper in what was said."

Nor is the federal rule at all different. In *Malone* v. *United States,* 94 Fed. (2) 281, the court said, p. 288:

> "Counsel have a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom, and to make reply to that made by opposing counsel, and, in doing so, statements may be made which otherwise would be improper."

In *Chicago U. T. Co.* v. *O'Brien,* 219 Ill. 303, 307, the court upheld the right of counsel,

> ". . . to denounce a witness as unreliable or untruthful when subjected to any of the tests for determining his credibility."

In *Goldstein* v. *Smiley,* 168 Ill. 438, the court observed, p. 444, that "counsel cannot be put into a straight-jacket when making their arguments."

To the same effect are:

North Chicago St. R. R. Co. v. Anderson, 176 Ill. 635, 637.

Chicago City Ry. Co. v. Bruley, 215 Ill. 464, 468.

North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486, 502, 503.

West Chicago St. R. R. Co. v. *Annis,* 165 Ill. 475, 478, 479.

Petitioner cites several cases, which we will not discuss in detail. The facts are in no sense parallel, and the decisions are not helpful here. The cases which we have cited are controlling; the entire matter was within the discretion of the trial judge; and his approval of the verdict should dispose of the question.

In discussing the case of *New York Central Railway Co.* v. *Johnson,* 279 U. S. 310 (a case which bears not the most remote resemblance to this case) petitioner seeks to make it appear that he was denied the right to be heard "in a dispassionate manner according to established rules of law and procedure." Petitioner was accorded that right. He was given every opportunity to make his defense, although his method of defense was so far from "established rules of law and procedure" as to evoke from the court the inquiry whether he was serious in the point he attempted to make. Having put in his defense, it was our privilege to comment on it.

II.

THE SUBJECT OF PETITIONER'S PROSECUTION FOR DRUNKEN DRIVING WAS OPENED UP BY THE PETITIONER HIMSELF. HE CANNOT COMPLAIN THAT THIS TESTIMONY WAS INCOMPETENT, SINCE HE OPENED THE DOOR FOR IT.

There can be no serious controversy over the fact that the petitioner was drunk at the time of the accident. His condition of intoxication was described by a police officer, a deputy sheriff, a physician, a farmer who lived nearby, and a woman passerby, as well as the respondent, Orland Heald. The deputy sheriff and the physician saw him in the jail, immediately after the accident (Tr. 30, 31, 41, 42). We were entitled to the testimony of these witnesses be-

cause the petitioner denied that he was drunk; the testimony of the officer to whom he confessed that he had had seven drinks of whiskey (Tr. 31), and of the doctor who examined him professionally, and to whom he also admitted that he had too many drinks (Tr. 42), was important on that issue. The place where these conversations and examinations took place was a necessary part of the testimony; the jury were entitled to know when, where, how and under what circumstances these people acquired their knowledge of petitioner's condition.

It was obvious, of course, that if these people saw him in jail, he was taken there because of his intoxication. While the fact of his arrest is something which may well be galling to the petitioner, and which he would prefer to have forgotten, it was a necessary sequel to and part of the circumstances of the accident; the petitioner himself is entirely and solely responsible for it.

When we inquired of officer Smith what action he took about the petitioner's condition, an objection was immediately interposed and sustained by the court (Tr. 20, 21).

Petitioner, however, was not satisfied to let well enough alone. When cross-examining deputy sheriff Crawford, he sought to show that the witness never testified in any other proceeding that the petitioner was drunk (Tr. 32). This, of course, opened up the subject of other proceedings, and on our re-direct we inquired of the witness whether he was called as a witness in the other proceeding. Petitioner then sought to show by this witness that he was acquitted of the charge of drunken driving, and promised to bring in the record of the criminal proceeding (Tr. 33). Thus it is clear that the criminal proceeding, about which complaint is now made, was injected into the case by the petitioner himself.

Apparently the petitioner was not greatly concerned over this collateral issue during the trial, since he permitted his witness Keefer to be cross-examined on the subject without making any objection (Tr. 177, 178), he testified himself on his direct examination (Tr. 188, 189), and finally he produced the deputy county clerk with what purported to be the original record of the criminal proceedings (Tr. 206 *et seq.*).

The court will remember that we claimed the petitioner was drunk. He denied this charge. We proved it by a number of witnesses who saw him in jail immediately after the accident. The petitioner then, of his own volition, brought the criminal proceedings into the case; he cannot complain of his own act.

In *Reed* v. *Alton Water Co.*, 301 Ill. App. 219, it appeared that the driver of the automobile was drunk, was brought to the police station, that he was locked up until morning. The court held that (p. 223):

> "All these various circumstances constituted abundant proof to justify the jury in finding that Henry was drunk at the time of the accident."

In *Nelson Construction Co.* v. *Industrial Com.*, 286 Ill. 632, 637, plaintiff, after having procured from the court a ruling that certain testimony was inadmissible, brought out the same facts in her own examination of the witnesses. It was claimed, on appeal, that the evidence was incompetent, but the court held that plaintiff was in no position to complain, since it was in the case through her own act.

In *Kortylak* v. *Johnston City B. & L. Assn.*, 279 Ill. App. 88, it was held, p. 91:

> "Where a party offers similar testimony to that to which it objected when offered by the opposing party, it is in no position to claim error, as a party cannot

complain of an error which it also committed; as held in *Bogart* v. *Brazee,* 331 Ill. 160, 181; *Supolski* v. *Ferguson & Lange Foundry Co.,* 272 Ill. 82, 89; *Kuhn* v. *Eppstein,* 239 Ill. 555; *Huling* v. *Century Publishing & Engraving Co.,* 108 Ill. App. 549. And for the reason as stated in *Kuhn* v. *Eppstein, supra:* 'If the evidence for the appellee was incompetent, so was that for the appellants, and they ought not to be heard to complain that evidence of the same character which they offered was not competent.' "

To the same effect, see:

Illinois Steel Co. v. Wierzbicky, 206 Ill. 201, 207.
Armstrong v. C. & W. I. R. Co., 263 Ill. App. 126, 144.
Heine v. Degen, 362 Ill. 357, 376.
Bogart v. *Brazee,* 331 Ill. 160, 181.
Jones v. *Sanitary District,* 265 Ill. 98, 102.

Petitioner cites the case of *Chicago City Railway Company* v. *Uhter,* 212 Ill. 174, as authority for his argument under this heading. The distinctions between the *Uhter* case and the present case are obvious. The court in the *Uhter* case held that evidence of the arrest of defendant's servants was inadmissible because there was no wilful and wanton charge in the declaration. In the instant complaint, Count II was based on wilful and wanton misconduct of the petitioner. Furthermore, in the *Uhter* case the court intimated, p. 183, that the verdict was so large that the jury might have awarded punitive damages. In the instant case the damages are meager compensation for the injuries involved and no claim that they were too large or that they were punitive in their nature was made either in the lower courts or here.

Furthermore, in the *Uhter* case the evidence of the arrest of the street car crew was a direct intimation that they

were guilty of negligence, the ultimate issue which the jury were called upon to determine. In the instant case, the fact that petitioner was arrested for drunkenness would not, of itself, prove the facts at issue in this suit, since the petitioner might have been drunk and still not be guilty of negligence, as is strenuously urged by him under Point I.

What would have been the inference arising in the minds of the jurors, had we shown by the police officers that the petitioner was drunk, but had omitted to show that the witnesses, as officers of the law, had taken any action? Would not the jury have been justified in doubting their testimony, because they failed to do their duty? Was not the act of the officer, in arresting the petitioner, part of the *res gestae,* and did it not show his good faith, and corroborate his testimony that the petitioner was drunk?

Petitioner also cites the case of *Cammarano* v. *Gimino,* 234 Ill. App. 556, which he asserts is authority for the proposition that evidence of the petitioner's arrest cannot be introduced under a wilful and wanton charge. Aside from the very apparent reason that the Illinois Supreme Court has decided otherwise and the Appellate Court cannot overrule the Supreme Court, we wish to point out that in the *Cammarano* case the question of whether evidence of the arrest of the defendant was admissible in a civil proceeding, was not involved. In that case, the plaintiff attempted to prove by the criminal record that the defendant was convicted of a crime. The court held that this could not be done because the criminal record was not evidence in a civil suit of the truth of the charges on which the prosecution was based. That has nothing to do with the proposition of whether a witness can state that when he saw the petitioner in jail, the latter was intoxicated. The

offer of the criminal court record in this proceeding came from the petitioner and not from the respondents. The record which was offered in this case disclosed a *nolle pros*, not a conviction.

In the case of *Chicago City Railway Co.* v. *Reddick*, 139 Ill. App. 160, the court held, p. 171, as follows:

> "While it was not error to prove the arrest of the motorman at the time of the accident, it became error to refuse to permit evidence to be given as to the cause and reason of such arrest."

We submit that the question decided in the *Reddick* case is the precise point at issue here; that this point was not touched upon in the *Cammarano* case cited by the petitioner, and that the only authority directly in point is the *Reddick* and *Uhter* cases, which hold evidence of the defendant's arrest admissible.

The judgment in this case is amply sustained by the evidence. No substantial error was committed on the trial. We urge that the petition for writ of certiorari be denied.

Respectfully submitted,

JOSEPH D. RYAN,
Counsel for Respondents.

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REPLY BRIEF OF PETITIONER

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MAY IT PLEASE THE COURT:

Respondent's contention that the inspection made by defendant's employe was inadequate is not supported with authority or by the evidence (Opp.'s Br. 2, 3). Instead respondents themselves, with pretended authority, declare that the inspection was inadequate as against the opinions testified to by the mechanics of years of experience who were witnesses in the case.

Roy Thomas, the mechanic who inspected defendant's car when it was taken in trade by the firm, had been a mechanic for that firm for four and one-half years (Tr.

243). He testified that he was an automobile mechanic and knew what it was necessary to do with a car to make it safe for use on the highway (Tr. 246). The car in question looked O. K. to him upon inspection (Tr. 243), and when he put it in the used car lot it was the average 1934 Chevrolet (Tr. 244). The inspection at the garage in LaGrange was made by Floyd Baker who had been an automobile mechanic for eighteen years (Tr. 152, 154). He testified that a mechanic runs across many automobiles that have a creaking noise caused by loose nuts on the bolts that hold the wheel to the axle drum. This evidence is not controverted.

It is our contention that these inspections represent an effort by the defendant to keep his car in a safe operating condition, that certainly satisfies the requirements of a reasonable inspection and therefore the defendant is not liable for injuries to the respondents resulting from the undisclosed condition of his car.

It is of course easy to argue after the fact that the mechanic who made the inspection should have tested the nuts and bolts on the car. There is no evidence in the record that such an inspection would have disclosed a defect, but on the contrary the evidence shows that such a defect could not have been ascertainable. The evidence shows that the nuts were tightened to the bolts two hours before this accident occurred, and the mechanic, having no interest in this controversy, told the defendant that the car was "O. K." (Tr. 154.)

Respondent's insistence that if a nut can be pulled through a hole (Opp.'s Br. 3), the hole must be larger than the nut, and that if the hole had been worn larger than the nut after the collision it must have been so when the nut was tightened two hours before the collision, answers itself. The point is that the evidence showed that Baker, the mechanic, who tightened the

nuts on those bolts, pronounced the wheel O. K. There is also the corroborative testimony of Mahoney, also disinterested, who was present at the time it occurred (Tr. 158, 159).

Respondent's brief, page 4, seems to infer without saying so that the defendant was drunk at the time the wheel was repaired, and that for this reason his drunkenness was an issue in the case. It is to be noted that there is no reference to the record. Actually the only evidence on the subject was that the defendant was not intoxicated at that time. Both Baker and Mahoney testified that the defendant was perfectly sober (Tr. 154, 159).

Therefore, if the right to recover in this case is based upon the theory of negligence in the failure to make an adequate inspection, the question of the defendant's intoxicated condition is not even in issue, and the jury should have been permitted to pass in a dispassionate manner on the question whether or not the inspection was adequate.

Respondents dwell at great length on defendant's behavior following the collision for the purpose of showing defendant was drinking and how drunk he was (Opp.'s Br. 15). This lurid description must be somewhat discounted. It is a matter of common knowledge that the behavior of one who has just been in a violent collision is not normal. Defendant's behavior for a large part is as symptomatic of shock and pain as it is of drunkenness and in no way measures the extent to which the defendant was under the influence of liquor, if at all, immediately preceding the collision. Two witnesses on the scene of the accident, Sorenson (Tr. 163, 164) and Keefer (Tr. 143) both testified that the defendant was sober. Keefer accompanied Milburn when he was taken to the Kane County jail (Tr. 174) and

thought that the defendant was dazed from the accident. Obviously the defendant could not deny his behavior following the collision when he remembered nothing from the time of the impact until he heard the officer say, "Get into the car." (Tr. 187.) He also testified that he was not intoxicated.

Therefore, there are five witnesses who testified that the defendant was not intoxicated. Only the defendant himself was an interested witness. Keefer and Sorenson saw him at the scene of the accident and Baker and Mahoney shortly prior thereto. Certainly there is a fact issue here present which the defendant was entitled to have the jury construe in a calm and dispassionate manner. Especially is this true since respondents themselves both testified that as the defendant's car approached there was nothing about the manner in which it was being driven which attracted their attention (Orig. Br. 14). If it was being driven in a proper manner upon the highway, then even though the defendant was intoxicated there would be no liability as respondents admit in their brief. This presents the question whether or not the defendant's intoxication, if he was intoxicated, was the proximate cause of the injury, another question which defendant was entitled to have the jury pass upon in a calm and dispassionate manner.

These are the fact issues which constituted the defense that was characterized as being dishonest, miserable, unfair and untrue. As shown in our original brief, the theory that the wheel coming off of defendant's car was the proximate cause of the collision was presented by the respondents themselves in their pleadings (Orig. Br. 16), and there was no justification in the record which characterized this theory or any of the defendant's theories on the facts as being dishonest, miserable, unfair and untrue. This charge was not a comment on

the evidence; it was a characterization of our entire defense. As we have shown in our original brief it stated no reasons why the charge could be considered justified (Orig. Br. 19). It was a blanket charge that all of defendant's witnesses were untruthful.

The cases cited by respondents in their brief do not authorize such argument. For example, the cases of *Commonwealth Electric Co.* v. *Rose,* 214 Ill. 545, 561, 562, quoted by respondents (Opp.'s Br. 9) shows that counsel may arraign the conduct of the parties and impugn, excuse, justify or condemn motives only so far as they are developed in the evidence and assail the credibility of witnesses when it is justified by impeachment, inconsistency, incoherency, or the manner of testifying, or by appearances or circumstances. It is true that a just and fierce invective is not discountenanced by the court, but it must be based upon facts in evidence.

Again *Chicago U. T. Co.* v. *O'Brien,* 219 Ill. 303 (Opp.'s Br. 10), shows that the right of counsel to denounce a witness as unreliable or untruthful is permissible only when the testimony is subjected to the tests for determining his credibility.

If the remarks objected to were based upon the evidence and constituted a discussion of the evidence, we would have no complaint. But instead of doing so the argument charged all of the witnesses for the defense and defense counsel as well with being dishonest. It is, therefore, not a proper argument, and even the cases cited by respondents show that it is improper.

In a further attempt to excuse the argument respondents try to evade the issue by attacking the argument of the defense to the jury (Opp.'s Br. 8, 9). But that is not what the argument characterized. Counsel was characterizing our whole defense. He was not criticizing the handling of the case or any incidents of the trial.

Moreover, there is no question of the propriety of the defendant's argument to the jury. There was nothing improper in the statement that the complaint did not charge the defendant with driving a car while under the influence of liquor. Such was the fact, and there is a statute in Illinois making it unlawful to so drive a car. When it is considered that every other conceivable statutory violation was declared upon by respondents, it would seem that if they intended to claim that the defendant was operating a car while under the influence of liquor, the complaint would have so alleged. Especially is this true if the complaint was to inform us of the case which we were being called upon to defeat.

As a matter of fact, we were surprised and thought we had a point which we strenuously raised upon the trial (Tr. 13, 14, 15). Only a thorough research of the authorities after the trial convinced us that our point was untenable. Also it was a fact that the cross-examination of Dr. Conley was inaudible, so inaudible that one of the jurors asked him to speak louder. It was a further fact that Mrs. Jackson was in plaintiffs' counsel's office with Mrs. Olson and Mr. Yarnell discussing the case. Mrs. Jackson was at the scene of the accident all of the time that Mrs. Olson was there, and even after Mrs. Olson left (Tr. 80). Certainly we had a right to comment upon the failure of the plaintiffs to call Mrs. Jackson as a witness, particularly after the emphatic testimony of Mrs. Olson and the vehement testimony of Mr. Yarnell who would not discuss the accident with us when we tried to interview him. It was a fact that the plaintiff was a court reporter in Nebraska, and it is fairly reasonable from the evidence that he has seen people with crutches walk out of courts with more money than those who walked in without them. This is particularly true when it is considered that Drs. Conley and Zeitlin, both outstanding reputable

orthopedic surgeons, testified that the crutches were unnecessary (Tr. 226, 274). However, the point is that these comments were comments on the evidence and incidents of the trial.

The vituperative and intemperate remarks of respondents' argument to the jury were charges that all of our witnesses were perjurors, and the inference was left with the jury that we also were aiding and abetting in the defense of a case which was miserable, unfair and untrue. It ceases to be a court of justice when an argument can be made without any basis in the evidence or in the incidents of the trial which arraigns the entire case of the adversary and where an attorney is permitted to loudly exclaim to the jury that his blood boils because the defendant insists upon his constitutional right of a trial by a jury of his peers in which no substantial error shall intervene to his prejudice and which should be conducted in an atmosphere conducive to dispassionate discussion by the jury when they retire to consider their verdict. Even a defendant in a criminal case, however guilty, is entitled to have his case decided upon a record devoid of intemperate and unwarranted accusations. Certainly no one is in a position to say that it is harmless error when a jury is told that the defense of a case is dishonest, miserable, unfair and untrue, that it is a lie which will fit only into another lie, and that it makes the blood of plaintiffs' counsel boil to have to sit and listen to it.

Regarding their injection into this case of evidence that defendant was arrested and taken to jail respondents content themselves with the general assertion that this evidence was a necessary part of the testimony (Opp.'s Br. 12). Why it was necessary is not stated. It is not shown in what respect the evidence was relevant, except to suggest to the jury that if the defendant

was arrested and taken to jail it must have been because he was drunk (Opp.'s Br. 12). It is precisely because this conclusion does not follow that the evidence was not relevant. Because one is inclined to draw this false conclusion, as respondents here demonstrate, this type of evidence is highly prejudicial and the respondents should never have introduced this subject in examining the witness Smith and the witness Crawford (Tr. 20, 21, 29, 30). Over our repeated objections Crawford was permitted to testify in response to respondents' improper direct examination that defendant was arrested and taken to jail (Tr. 29, 30). It was in an attempt to counteract the prejudicial effect of this testimony and thereby avoid the inconvenience of a second trial that we inquired of Crawford on cross-examination in order to show the outcome of the criminal proceeding whether he had testified in any other proceeding against the defendant (Tr. 32).

It was not for the purpose of opening up the subject of the criminal proceeding that we made this inquiry as respondents would have this court believe (Opp.'s Br. 12). There is no question on the record but that the issue with respect to arrest was opened up by respondents. Then, unwilling to yield their unfairly gained advantage, they proceeded to frustrate defendant's counteractive measures by attempting to show that the criminal proceedings were *nolle prossed* through their good graces and intervention, which was not the fact. Now, they stand in this court and say petitioner introduced the subject.

Reed v. *Alton Water Co.*, 301 Ill. App. 219, cited apparently to show that evidence that a man was brought to a police station and locked up is relevant to the issue of intoxication, does not touch that point, though plaintiffs, by a distorted statement of the case, would have

this Court believe that it so holds. The point was never before the Court and the Court never decided the evidence was admissible. Apparently it went in without objection. The rule is well settled in Illinois that a judicial opinion, like a judgment, must be read as applicable to the facts involved and is an authority only for what is actually decided. (*People ex rel. Shuler* v. *Chapman,* 370 Ill. 430, 435; *White* v. *Seitz,* 342 Ill. 266, 270.)

Respondents cite *Nelson Construction Co.* v. *Ind. Com.,* 286 Ill. 632, 637, and other cases (Opp's Br. 13, 14) to support the proposition that we cannot complain of the error in the admission of the evidence relating to the defendant's arrest on the spot by a constable and subsequent removal and incarceration in jail. These cases do not support their position. The *Nelson* case was a case where incompetent evidence of a witness was objected to by a party and his objection was sustained. Thereafter, on cross-examination of the same witness, the party whose objection was sustained elicited the incompetent evidence in response to questions asked without making any motion to exclude such evidence. The Supreme Court of Illinois held that such party could not complain that such evidence is incompetent. The inapplicability of this and the other cases cited is obvious. Here we went into the question only after respondents' improper evidence was introduced and only after the issue thereon was made up by the rulings of the trial court.

Kortylak v. *Johnston City Bldg. & Loan Assn.,* 279 Ill. App. 88 (Opp's Br. 13), is rather ambiguous. If it holds that a party after objecting to certain evidence and having his objection overruled proceeds to offer similar evidence to rebut the evidence erroneously admitted over his objection, waives the point of his objection by offer-

ing the similar evidence, it is not in accordance with the well-settled rule in Illinois as laid down by its Supreme Court. All that the remaining cases cited by respondents hold is that a party cannot complain of erroneous evidence admitted by his adversary where he himself has offered similar evidence. But where a party initially objects to the admission of evidence and his objection is overruled (as in the case at bar), he does not thereby waive his objection by offering similar evidence to rebut the evidence erroneously admitted over his objection. That is the point here because there would have been no evidence with respect to criminal proceedings at all if respondents had not brought out the fact initially, which was admitted by the Court, that the defendant was arrested, taken to jail and incarcerated. Over our objection the trial court ruled this evidence admissible and under the law we had the right to offer evidence in rebuttal. *Chicago City Railway Co.* v. *Uhter,* 212 Ill. 174 (Orig. Br. 33, 34 and other cases there cited).

Neither are respondent's contentions sound that the evidence in question was admissible. *Chicago City Ry. Co.* v. *Uhter,* 212 Ill. 174 (Orig. Br. 32) does not hold the evidence admissible as respondents infer but holds the evidence inadmissible and cites for its authorities *Luby* v. *Hudson River Railroad Co.,* 117 N. Y. 131, which respondents do not discuss at all. Respondents say that our authority, *Cammarano* v. *Giemino,* 234 Ill. App. 556, is not authoritative because the Illinois Supreme Court has decided otherwise, but cite no Illinois Supreme Court authority wherein the decision is otherwise. They also say that the question of evidence of the arrest of the defendant in the civil proceeding was not involved in the *Cammarano* case. Technically that is true because what was involved was whether a conviction in a criminal case was admissible. Obviously, if you could not prove in a civil case that the defendant had been con-

victed of a similar charge in a criminal proceeding growing out of the same subject matter, you could not prove in a civil suit that he had been arrested. Certainly his conviction is much stronger evidence of the fact of his guilt than his arrest for the crime. The reason why evidence of arrest and subsequent criminal proceedings is inadmissible in a civil suit is because of the element of prejudice. We submit that the *Cammarano* case is decisive here and this court in examining that opinion will note the many Illinois and foreign authorities cited by the court to support the conclusion reached.

Chicago City Ry. Co. v. *Reddig,* 139 Ill. App. 160, is really authority for our position inasmuch as the basis of the holding is to get away from the possibility that a jury will infer blame from the arrest. In addition, the question of the admissibility of the evidence of arrest was not before the court. The question before the court was whether or not the reason for the arrest was admissible and the statement made by the court with respect to the evidence of arrest was dictum. The same court subsequently decided the *Cammarano* case and there is no question about the status of the Illinois law at this time (Orig. Br. 35).

In our opinion the nub of the whole case is set forth by respondents on page 15 of their brief. There they admit that the fact that petitioner was arrested for drunkenness would not of itself prove any fact in issue in the case for the reason that petitioner might have been drunk and still not be guilty of negligence. Although respondents do not say so, petitioner might have been arrested although not intoxicated. If the petitioner, though drunk, was not guilty of negligence, then the evidence of his drunkenness would be absolutely immaterial and irrelevant to the issues in the case. Then why the undue emphasis on that issue?

Secondly, whether drunk or sober, petitioner's arrest would not be proof of the fact even in a criminal proceeding, much less in a civil case. But respondents were not content even to try the issue of drunkenness in this case. They say (Opp.'s Br. 15) what would have been the inference if they had not shown that the officers did their duty. Conversely, what is the inference arising from the arrest? The issue whether defendant was drunk or sober was a contested fact issue for the jury in this case to decide, but respondents insist upon having that issue decided by the officer on the scene of the accident.

Upon the whole record there is serious question whether the petitioner's alleged intoxication had any causal relation whatsoever to the accident for the reason that he was not guilty of negligence. It must be apparent that the undue prominence accorded to the issue of intoxication and the petitioner's arrest was for the purpose of creating a favorable background against which to try the issues of this case. In other words, that the petitioner must have been drunk or he would not have been arrested and that since he was drunk and an accident happened, the drunkenness must be the cause. Therefore, liability. And this is the atmosphere and stage dressing in which we were compelled to submit the issues of adequate inspection and proximate causation. When added to this you have the unfounded charge that the defense of adequate inspection and no proximate causation is dishonest, miserable, unfair and untrue, which charge receives a tacit consent and approval of the trial court, how could the jury calmly and dispassionately consider the issues presented?

The errors are unquestionably prejudicial. We know of no doctrine that "any trial" is good enough for a "dishonest, drunken man." This was a court of justice

and the petitioner, drunk or sober, was entitled to have the issues decided according to the established rules of law and procedure. He was not asking for more than his legal right when he asked for an opportunity to be heard. And he was entitled to be heard in a calm and dispassionate manner, in a trial free from prejudice. He was not given that right, and in justice we submit that this court should review the case.

Respectfully submitted,

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